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PUBLIC DESTRUCTION OF PRIVATE REPUTATION — A REMEDY?*

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Once upon a time, "we the people" institutionalized ourselves into a National Government with departments and officials on which we conferred powers subject to various limitations. We did not define our relations as individuals to this Government other than to specify certain rights which must not be transgressed by it, and to provide that the enumeration of "certain rights shall not be construed to disparage others retained by the people."[1] Nor did we provide remedies in behalf of the individual for the transgression of these rights. This attempt to place government and officials under law was the continuation of a struggle as old as the institution of government. The express retention of basic rights of citizenship inviolate from transgression was both an affirmance of the heritage of free men and an extension of their rights under the protection of law.

We have not escaped irresponsible treatment by government and officials despite these safeguards. Nor have remedies yet been found to penalize the transgressor or to compensate the injured individual. Our failure to contain government and officials within law has in recent years become distressing and indicates too vividly how feeble the individual is in the struggle to protect his interests against those of the group—any group. And how feebleness increases as group power, as it must be, is transferred to group organization and officials. And how the individual's safeguards almost vanish when government becomes greatly expanded and impersonal, and officials become so numerous and so powerful that in times of stress both government and officials disregard the restraints imposed by the group as well as lose their own self restraint. Our dramatic emergence from "sovereign and subject" did not result in

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1. U. S. Const. Amend. IX.

any great change of character in government nor did it eliminate the abuses of power by officials.

Perhaps we made our first and most egregious blunder when our courts accepted the doctrine, already supplanted in other civilized countries, that the "king can do no wrong," the authority that makes the law is above the law, the sovereign is immune from suit in its own courts without its consent, the individual injured by government must come as a supplicant for his relief.[2] However unnecessary the acceptance of such a limitation on the liability of the National Government may have been, the error has been partially corrected by providing courts to determine claims arising out of contract and the taking of property, and by provision for a suit for damages against the United States for injury to person and property due to the negligence of its employees. But for the violation of the rights of citizenship, government has not yet recognized its responsibility through legal action. [The nearest approach to such responsibility is probably found in the Supreme Court's recent holding that certain organizations listed by the Attorney General as subversive were entitled to an injunction and declaratory judgment against his action where he had not accorded the complaining organizations an opportunity for a hearing.[3]]

Nor can the official himself be called to account. The immunities developed at common law and under the English Bill of Rights for the protection of the English official have been extended by the courts to the officials of American government. While it is true the official is not given protection for his own sake, but in order that he may fearlessly serve the group, nevertheless, however deliberate his wrongdoing, he receives protection, and his victim is without remedy. This immunity is complete so long as the official acts within the ambit of his official functions.[4]

The immunities do not end here. In order that what officials in the exercise of their functions do and say, may be known to "we the people," reporters and publishers of what officials do and say are likewise immune from liability, so long as true and fair reports are made, however false and hurtful they may be. The witness who testifies against a citizen in a Government investigation[5] and also the reporter of what he says are given the same immunity. Immunity is also given to the irresponsible charges of irresponsible persons

2. Kawananakoa v. Polybank, 205 U. S. 349 (1907); Borchard, *Governmental Responsibility in Tort*, 36 Yale L. J. 1, 17, 757 (1926).
3. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U. S. 123 (1951).
4. U. S. Const. Art. 1, § 6; Tenney v. Brandhove, 341 U. S. 367 (1951); Gregoire v. Biddle, 177 F. 2d 579 (2d Cir. 1949).
5. Kelly v. Daro, 47 Cal. App. 2d 418, 118 P. 2d 37 (1941).

accepted by officials and put into circulation through speeches and news conferences, releases and committee reports. Whatever is left of the original limitations on these immunities is hardly worth their mention.[6] They may or may not be necessary for the successful operation of government, and they may have been extended too far. But it is too late in our history to argue their wisdom. They are here and here to stay.

The Bill of Rights affords no relief to the individual against these immunities of government, officials, witnesses, publishers and reporters. The Bill of Rights gives only negative protection against the National Government. Its protection may be invoked by way of challenge to the validity of some statute, ordinance, or of some administrative or judicial process, but it gives no affirmative remedy. It affords slight protection to the individual even negatively (as witness the invocation of the Fifth Amendment) from injury to his standing in the community, his employment or trade, or his relations with his government. For these vital interests there is little the individual can do to invoke his rights reserved as a means of counteracting the paralytic stroke of official action.

In fact, except as against the National Government itself, and those rights which have recently been read into the 14th Amendment, the rights of national citizenship are meager. They were listed by Mr. Justice Miller in the *Slaughter House* cases[7] for the majority of the Court in its great debate with the dissenting Justices Bradley, Swayne and Field involving the scope of the 14th Amendment.[8]

Few indeed of the fundamental rights of citizenship are included in his list. Some of the rights listed such as the right of assembly, the right to seek the government's protection, to share its offices and to engage in administering its functions were overstated; at least they have since been subjected to the severest limitations if not denied altogether. While under the broad language of the 14th Amendment "All persons born or naturalized in the United States . . . are citizens of the United States. . . ." it did not extend the protection of the National Government to the rights of citizenship in many of their most important aspects.

Under the 14th Amendment the National Government undertakes to protect the individual when certain fundamental rights

6. Matson v. Margiotti, 371 Pa. 188, 88 A. 2d 892 (1952); Note, *Protection From Defamation in Congressional Hearings*, 16 U. of Chi. L. Rev. 544 (1949); Comment, *Congressional Investigation—Defamation Immunity*, 18 U. of Chi. L. Rev. 591 (1951).

7. 16 Wall. 36 (U. S. 1873).

8. See Konvitz, The Constitution and Civil Rights 32 *et seq.* (1947).

reserved in the Bill of Rights are denied by state action, but other rights regarded as fundamental are not protected against state action. What these fundamental rights are has been the great battleground of the Supreme Court in recent years. The National Government offers the individual *no* protection when his rights, fundamental or otherwise, are violated by private persons or groups, except in the rare instances which fall within the remnants of the Civil Rights Acts. Here is the great void in national citizenship. Protection against other individuals and private groups is left to the states.[9] Whether the National Government has been warranted in side-stepping its responsibility for the protection of "we the people," and whether the status of national citizenship should have been so minimized, might once have been arguable, but here also argument comes too late unless the Supreme Court radically changes its course of decision. How long the National Government can justify withholding full protection to its citizens against its own officials, and also against private persons and groups, is still an unresolved question, and one that is not subject to easy resolution.

In still another direction the rights of citizenship have been put in even greater jeopardy and perhaps with less justification. It must be assumed, I think, that high among the basic rights specifically enumerated and those not enumerated, one of the fundamental relations of a citizen to his national government (the only one we shall discuss here) is that or participation in its affairs—one of those rights so readily assumed by Justice Miller. It would seem quite apparent that no Bill of Rights was necessary to reserve this right from official transgression. Its explicit reservation could add little to the implicitness of the right of participation in democratic government. This right of participation is made effective by the right to vote; to hold office within the framework of the political organization; the right to advocate, criticize, support and oppose through speech, and press, and silence, the policies and conduct of government by its officials; the right to assemble with other citizens for such purposes; the right to teach citizens the history, methods, theories and meaning of government; the right to receive training and be taught the history, methods, theories and meaning of government and also the learning, culture and scientific methods by which "we the people" must sustain our political order; and generally, to participate in the affairs of government on an equal basis as other citizens.

One of the strangest quirks in constitutional history is how these

9. Collins v. Hardyman, 341 U. S. 651 (1951).

rights of participation in government have been watered down. By a puzzling process of judicial reasoning, too involved for consideration here, many of these rights have been reduced from "rights withheld," to "privileges conferred" by the very government from which they were withheld. By a process of inversion the machinery set up has become the master of the people who set it up; government has become the dispenser of "privileges" which (by express provision) were reserved from its hands. The right to vote; to hold office; to be employed and retain employment in government work; to teach citizens; to advocate and criticize; to go to school and be taught; to practice law; are some of the rights intimately involved in the affairs of government of "we the people," which have fallen under this amazing doctrine.

This strangulation in large part has been accomplished by the imposition of "conditions" required as a basis of the enjoyment of these rights. The right to vote may be conditioned upon a poll tax or other requirement. The right to hold office may be conditioned by a long list of handicaps from getting on a ticket of a recognized political party, of swearing to some oath or yielding to some other test which in effect negates the right to be a candidate for office. The right of employment by government, aside from efficiency tests, is subject to loyalty oaths and personal inquiry into the applicant's beliefs and the history of his private life; and after the employment relation is established is further subject to a process of screening, review boards, and even dismissal without provision for hearing on specific charges or that otherwise meets the test required by our courts for the determination of the truth of accusation or other fact. For this in part at least we have Mr. Justice Holmes' famous dictum[10] that a police officer may have the constitutional right to free speech but he has no constitutional right to be a policeman. Why not? If he is a citizen why has he not the right to be a policeman provided he has the qualifications for the job? Why must he surrender his right to talk and act politics because he is a policeman, any more than if he is Governor, Senator, or any other official? If a citizen does not have a constitutional right to be employed by his government and to be retained after employment unless he surrenders other constitutional rights what has become of his rights of citizenship in a government of "we the people"? Whether his conduct merits dismissal for lack of fitness or for some other reason is a different matter.

The right to teach citizens, young or old, the right to attend

10. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N. E. 517 (1892).

schools, public or private—each important in the affairs of government, the right to practice law—indispensable in a democratic government—are with more and more frequency available only on condition of the abnegation of rights which "we the people" provided should remain inviolate from interference by government.[11] Here then has been developed the means for conditioning constitutional rights out of existence; for leaving the citizen empty-handed of rights of citizenship he took so much pains to preserve.[12]

This is not to argue that government may not employ police measures against its enemies—even enemies who are at the same time citizens. Certainly not to argue that all the cases in which rights were held to be privileges were wrongly decided, not to argue that requirements may not be made to test the character and proficiency of officials, employees, teachers, students, lawyers and others who would enter the public service or share in the matters of government. In many of the cases there were good grounds for their decision without introducing false notes which have come to be accepted as good music. It is only to argue that the conditioning of the citizen's right to participate in his government is not a legitimate substitute for the police power, the criminal law and measures designed to test character and fitness.

The impairments of the rights of the individual citizen which I have named are serious, but it can at least be said that they have been made under law. The climax of this progressive impairment of his rights has now extended beyond the law. It is found in its most extreme form in the exaltation of the spying neighbor, the secret informer and the turn-coat patriot whose untested and unverified statements when placed in a police file by some strange alchemy are transmuted into facts—facts which executive and legislative officials are expected to accept and act upon, and which they sometimes do accept, publish and act upon for the purpose of separating citizens from their employment, subjecting them to humiliating inquisition and destroying their community and political standing. These specious facts cannot be used in court; they violate every basic rule of legal evidence. The accusations made are not of crimes, but if so, not provable crimes. Here then is a new sort of process outside the law and based on a type of proof which has not been counten-

11. Brown & Hassett, *Loyalty Tests for Admission to the Bar*, 20 U. of Chi. L. Rev. 480 (1953); Note, *Judicial Acquiescence in the Forfeiture of Constitutional Rights Through Expansion of the Conditional Privilege Doctrine*, 28 Ind. L. Rev. 520 (1953); Note, *Effectiveness of State Anti-Subversive Legislation*, 28 Ind. L. Rev. 492 (1953).

12. American Communications Ass'n v. Douds, 339 U. S. 382 (1950).

anced since the days of witchcraft and prosecutions in protection of the divinity of kings.[13]

Who is this spying neighbor, the secret informer? We never know except that he is the most revolting, cowardly and despised of men. Those who are most aggressive in requiring oaths of respectable and responsible citizens, require none of him. All that we know about this nameless and unidentified person is that he is willing to give his unsworn statement so long as he takes no chance of being called to account. He is willing to accuse but not willing to face his victim. We know nothing of his mental stability, his morality, his history, his veracity, his motives, his prejudices, his accuracy of observation, his desire to be important, his attitude towards his victim or of his fellowmen. In testing the weight to be given the accusations of a witness in court, all of these things are so important that he must face the accused and be subject to cross examination, refutation and the pains and penalties of perjury.

And how scrupulous are police? When were police given the exclusive function of weighing the reliability of witnesses? What is there in the history of police practices to warrant assurance that they will treat the person whose loyalty or character is put in question with any greater respect than they treat persons charged with crime and who must come under the processes of the courts? Much of our law is designed to hold the police officer in check. But here where he is much less experienced and much less fitted by training to deal with citizens under suspicion of disloyalty or deficiency of character we put both the police official and his secret informer outside responsibility to law.

There is no suggestion here that the spying neighbor, secret informer and turn-coat patriot should not be utilized by the police and other investigators as sources of tips and leads. Surely until they can be produced as witnesses this is all the respect their cowardice deserves. That what they say in secret should be accepted and published as a basis of action against a citizen, against whom proof of wrongdoing cannot be obtained, offends every sense of fairness and decency implicit in our basic law.

Oddly enough the processes of the criminal law are seldom called into play in the determination of even the most serious charges. There the accused would be under the safeguards of due process and other provisions of the Bill of Rights. Instead, methods are substituted which effectively by-pass these safeguards of the indi-

13. Justice William O. Douglas, *Too Many Short Cuts,* 129 New Republic 9 (Nov. 1953).

vidual. "Punishment by publicity" by formal speech on the floor of Congress, by committee hearings before radio and television, and by committee reports designed for political purposes is substituted for indictment and the penalties imposed through legal process; charges of treason are displaced by charges of disloyalty which fall outside any protection of law; contempt proceedings for exercising the right of silence are substituted for lawful evidence; secret police investigations, unsworn and untested statements, screening, dismissal, disgrace are the substitutes for a legal determination of an employee's wrongdoing. What some employee may do in the future is the subject matter of condemnation rather than what he has done in the past, and this based on his non-conformity of thought, his social habits, what he reads, his orthodoxy as interpreted by the prejudices of some unknown informer on matters of philosophy, economics, religion and theories of government, or even on his association with other people who themselves are charged with no wrongdoing, and in all of this without specification of charges, knowledge of who is complaining against him, without opportunity to be confronted, to examine those who inform against him, offer witnesses in opposition, and without counsel permitted to know anything more than the victim knows and as helpless as he. Even the men who determine the victim's destiny may not know anything more than the anonymous statements contained in some file handed them by a department clerk. There is no way to portray how far these practices are removed from what we find written in our fundamental law and in the minds and hearts of citizens through the teachings of our schools—at least in schools where the fundamental rights of citizens and the obligations of officials are still permitted to be taught. It is like some terrible nightmare that just can't be true, but is.[14]

I am thinking here of those who have suffered directly from such practices. Such men as James Kutcher, a private in the army of the United States who lost both legs in battle in Italy, and who was booted out of a branch office of the Veteran's Administration as disloyal because he had been a long standing and open member of the Socialist Worker's Party; of Dr. Condon, Miss Bailey,[15] Dr. Shapley, John Carter Vincent, Abraham Feller, John Service, Professor Jessup, Gen. George Marshall, Anna Rosenberg, teachers, actors, commentators, journalists, overseas personnel; and of hundreds, as reported by the daily press, of young and old employees

14. Fortas, *Outside the Law,* 192 The Atlantic Monthly 42 (August 1953).

15. Bailey v. Richardson, 182 F. 2d 46 (D.C. Cir. 1950).

of government in all its branches, whether pure as angels or not, who have been shunted out of their employment, humiliated and disgraced, all without respect for the rights reserved in our basic law for their protection.

It is not a question of guilt or innocence. Our officials seldom take the pains to formulate charges or find out whether they are true. That many are not condemned is beside the mark. Nor is it a matter of political party. The methods are much the same without respect to the party in power. Consider for a moment how far the whole process is removed from the spirit of law. Here we have courts, with officials sworn to act within prescribed functions, and processes derived through centuries of practical experience, established for the purposes of establishing guilt and at the same time protect the accused from false accusation and cruel treatment. But these we now ignore and reject. We substitute processes which our history, our law and our courts abhor. In the law books we have a beautiful system of justice; in the field of operations we too frequently employ the processes of the underworld.

Allan Barth[16] summarizes the situation in one of its phases as well as can be done in short space. He says:

> "Any American hearing of a foreign country in which the police were authorized to search out the private lives of law-abiding citizens, in which a government official was authorized to proscribe lawful associations, in which administrative tribunals were authorized to condemn individuals by star-chamber proceedings on the basis of anonymous testimony, for belief and associations entailing no criminal conduct, would conclude without hesitation that the country was one in which tyranny prevailed. And the most shocking aspect of the whole business is that we have accepted these curtailments of essential liberty for ourselves with no outcry, with no apparent sense of their implications.
>
> "It does not matter that these invasions of what were once deemed inalienable rights have been adopted for the sake of national security. It does not matter that the Attorney General exercises his power with restraint and that the FBI happens to be directed by a man free from sinister intentions. It does not matter that the loyalty boards are made up of high-minded and conscientious men. Dictatorship always has its origin in the assumption that men supposed to be benevolent may be entrusted with arbitrary authority. The American Republic was born in rebellion against such authority; it was nurtured on the doctrine that governmental power must be jealously circumscribed and kept, in particular, from interference with individual freedom of expression and association. The risk inherent in a disregard of

16. Barth, Loyalty of Free Men 129 (1952).

> this doctrine are graver by far—and more menacing to the real sources of American security—than the risks that would be run if the whole spurious system of evaluating loyalty were abandoned."

And of equal import are the words of Learned Hand spoken in another connection:

> "All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged. . . . A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism."[17]

But here also it may be too late to argue. The season of freedom has been short. Trial by oath, by ordeal, by police and by inquisition have returned, somewhat refined perhaps, but still cruel and brutal. The rights of the individual have become encrusted with judicial decision, encumbered by legislative encroachments, overridden by executive orders, and submerged in the sediments of acquiescence so long that the individual has become subject to the sovereignity of officialdom, rather than one of "we the people" subject only to law; and it must be accepted, I think, that no living American can ever hope to regain his rights of citizenship free of their recent historical development.[18]

Our question comes down to this: what recourse has a citizen who is subjected to false accusation by the National Government or its officials to the end that he is dismissed from his employment or is seriously injured in his relations with his fellow citizens?

As already indicated, the question is given contour by congressional investigations, the operations of departmental screening and review boards, and executive orders. The citizen affected may be a Government employee, a former employee, or any citizen at large who is drawn into an investigation as one investigated, as a witness, or merely as one whose name is besmirched by false accusation of some witness or by some member or some employee of a congressional committee. Even as so delimited the question is still many-pronged.

We can eliminate some of the considerations quickly. *First,* we

17. United States v. Coplon, 185 F. 2d 629, 638 (2d Cir. 1950).

18. See Meiklejohn, *What Does the First Amendment Mean?,* 20 U. of Chi. L. Rev. 461 (1953).

can now assume that the investigative power of Congress for all practical purposes is unlimited and that congressional committees can define their own procedures and follow their own methods.[19]

Second, I think we must assume that in the very nature of legislative and executive investigation there can never be developed practical processes for use in times of great stress which at the same time give the individual the opportunities of being fully heard on specific charges, of presenting witnesses in his own behalf, and of cross examination of other witnesses, all with the aid of counsel and reasonable time for preparation of his defense. The objectives of legislative bodies and administrative departments will not permit far flung and thorough inquiries however carefully prepared for in advance. The issues can seldom be well defined; much of the evidence is not available at first hand; much must be sifted from mountains of chaff. To slow down legislative and executive investigations to the judicial pace would be to impair their usefulness. To require them to make use of judicial processes would be something they cannot do. At high levels executive departments must have the power to fire and fire immediately for good cause or no cause at all. The atmosphere of inquisition and summary dismissal are wholly foreign to full respect for the individual's rights when opposed to interests of government which its officials hold more important.

Third, while Congress and the executive departments can greatly improve their procedures and methods of investigation, and probably will do so in some degree,[20] their adoption of methods similar to the machinery of the Moreland Act of New York or the Tribunal of Inquiry Act of Britain seems too distant for present hope. In a government of such proportions as the Federal Government there are too many inquiries to be made. The temper of Congress will not permit the delegation of appointment of commissioners to the president. Nor will members of Congress forego the opportunities of the political exploitation involved in many of the investigations. Many members would feel they were slighting one of their most important functions. What other phase of their official duties is so effective for impressing their importance upon their constituents? I would hazard the guess that the opportunity to make investigations, to do so publicly and with full freedom to utilize the political values involved, will not be surrendered by Congress.

19. For an excellent discussion of the power of Congress to investigate and its procedures, see 130 New Republic 6 (March 1954).

20. Fortas, *Outside the Law,* 192 The Atlantic Monthly 42 (August 1953).

Fourth, I think we must accept the fact that investigations and hearings, spying neighbors, over-zealous police and ill-founded charges will continue to be countenanced so long as our Government feels itself beset by communistic aggression and as long as there is sharp division on political and economic problems, and consequently that many citizens will have their rights of citizenship violated and some entirely innocent people will suffer great injuries.

So assuming, I can see no immediate relief to be found in preventives such as education of citizens as a whole to demand respect for their rights, or in appeal to the sense of fairness of officials, or in provision of adequate protective procedures and methods of investigation for the treatment of government employees and others who are such easy victims for political exploitation. I do not doubt, however, the value of such steps over the long pull. Thus accepting the fact that the individual has no means of protecting himself from false accusation by government or its officials, and has no remedy under law, it would seem the only sensible thing to do would be to give him a remedy. I would go further. It is inconceivable that in a civilized society he should go without a remedy.

The proposal here made was first shadowed by Messrs. Paul and Mandel.[21] They argued for a suit for libel in vindication of the injured person's reputation following the established procedures in libel actions without the protection given by official immunity, the action to be defended by the government at government cost and any judgment to be paid by it. The idea is good, but should be developed along lines quite foreign to a libel action. The action of libel was first developed by the court of Star Chamber and later by the common law courts through criminal processes for the protection of government against individuals, not for the protection of the individual against government.[22] The common law civil action of libel was developed for protection of individual against individual and not against officials of government acting within the functions of their office.[23] The libel action with all its cumbersome procedures does not lend itself as a remedy against government for false accusation made by officials or by other parties to an official proceeding. Professor Pedrick and Dean Prosser in recent articles indicate the

21. *A Remedy For Smear-By-Congress,* 122 New Republic 14 (Feb. 1950). See Sen. 782, 82d Cong., 1st Sess. (1951) by Senator Hunt of Wyoming in support of this proposal.

22. 5 Holdsworth, History of English Law 205-212 (2d ed. 1937); 6 *id.* at 360 *et seq.*; 7 *id.* at 326 *et. seq.*; Stephen, History of Criminal Law of England 371-373 (1883).

23. 8 Holdsworth, *op. cit. supra* note 22, at 333-346, 346 *et seq.*, 364-367.

tremendous difficulties of libel litigations and make their further discussion here unnecessary.[24]

In the action here proposed for false accusation there is but a single issue, namely, are the accusations made against the individual, directly or by implication, substantially true? Substantial truth is the only defense. Assume that false charges have been made by officials or by persons made use of by officials in their efforts to protect government. They have been made against defenseless citizens who have not had the opportunities of a fair and full hearing before an impartial tribunal with the aid of witnesses and counsel. The victims have been deprived of their rights of citizenship and have suffered financial injury as well as injury to their social and political standing.

Granted that government must act quickly and decisively; that it cannot stop to weigh its actions in the scales of justice. This is no excuse for refusing to make amends for its wrongs at a later date. There should be a judicial forum where victims who claim to have been falsely accused can go for the fair determination of specific charges made by persons in the flesh, face to face with the accused and subject to the safeguards which have been developed over the centuries for the protection of free men. The government has taken action on evidence which it deems sufficient. Its truth is challenged. Government in due season should be made to show its hand. It should have the burden of proving the substantial truth of the charges made or necessarily implied and if such charges are not sustained against the countervailing proof offered by the claimant he should recover damages for the loss shown to have been sustained by him. In no other manner can his right be vindicated.

The remedy does not lie far afield nor is it extravagant. Similar remedies have already been provided for breach of contract and for the taking of property by government, and now more recently for a large class of tort claims for personal injury and property damages. Under similar procedures provision could be made for claims against the government for injury to reputation, to employment and political relations due to the excessive or erroneous use of power by officials acting within the functions of their office. It is to be noted that the United Nations has made provision for such contingencies and has made awards to employees who have been unjustly deprived of their rights. It is the accepted way of enlightenment.

24. Pedrick, *Senator McCarthy and the Law of Libel: A Study of Two Campaign Speeches,* 48 N. W. L. Rev. 135 (1953); Prosser, *Interstate Publication,* 51 Mich. L. Rev. 959 (1953).

It is not an impractical thing to give great powers and then hedge against their abuse. It is an accepted method of government. The Bill of Rights itself is an instance in support. It only needs to be implemented by proper remedy. Such an action would in no way impinge upon the powers, privileges and immunities of officials acting within the functions of their offices in making investigations and in making such charges as seemed to them warranted by their findings. It would in no wise impede, restrict or change the character of their inquisitive procedures or methods of investigation. They could always save any action against the Government by those they find innocent by giving them a clean bill of health as in the case of Bishop Oxnam.

No argument can be made for compensation for the taking of property or for damages to property, or for personal injuries through negligence, that is not magnified many times by injury to a person's standing in the community, by destruction of his employment relations, and by impairment of his standing as a citizen. In most property and physical injury cases the victim is only a casualty of the inadvertence of some underling. Here he is the victim of charges by government at top level, deliberately though erroneously in most instances, set in motion against him with such weight as to crush him as a person worthy of the respect and trust of his fellowmen. It may be argued that the soldier, or even the civilian frequently gives his life in protection of his country, and receives no compensation for his sacrifice, why should the private citizen or government employee who is caught up in an attempt to protect his country be paid for his sacrifice? The difference of course is in being a casualty of the enemy, and one of your own government's wrongdoing. Also it may be said that the injury done a litigant, witness, or absent third party in the process of litigation before the courts gives no action for damages, why should he have one here? Again the difference is marked. The litigant, witness or other party present in litigation has the firm protection of the judicial process and its procedures. Moreover they, as does also the absent person, have the protection of a prosecution for perjury. Whether always adequate, or not, provision has been made for their protection, while here protection is absent except as a matter of grace. Group security is important but no group is entitled to security if the price is the destruction of innocent persons by the group itself without amends. To argue the point at all is to fall far short of its merits.

I doubt that anyone can question the wholesomeness of such a

remedy, inadequate though it may be. It might well be that the repercussions of a single successful suit for the false accusation of an innocent citizen would serve all the purposes of a shock treatment to the political nervous system of the nation and go far in restoring its balance. Reassured of their rights under law, the fears of the timid would tend to vanish; the spell cast by the spying neighbor would lose its power. There is nothing so calculated to make officials and other men disdainful of the rights of their fellow men, as the absence of accountability. Likewise there is nothing so calculated to make officials and other men so respectful of the rights of fellow beings as a judgment day at the bar of an impartial tribunal, even though the day of judgment may be remote. And under the philosophy of our political tenets, beliefs and professions, our government is not above the law, even though we grant our officials immunity from personal liability. It may be true that in many instances private rights can only be protected through political processes but wherever remedies under law can be readily fashioned for use by the courts our theory of government requires that it be done. The whole argument can be reduced to a single sentence: If "we the people" insist on having the additional protection gained by giving our officials the unrestrained power to disregard the rights of the individual, then "we the people" should be willing to pay for the mistakes made in our behalf.

Such a remedy would of course not be available to one who could not stand up under the charges leveled at him. He too is entitled to the protection of his rights, but any after-remedy like that in tort is subject to defeat by a victim's own wrongdoing even though slight in comparison with the charges made against him. Nor is it believed that many who were vulnerable would risk the judgment of a court. But if the protection of innocent victims can be salvaged it will redound to the benefit of all those caught up in the investigation net. Government, as well as others, learns caution when subject to law.

The weakness—perhaps fatal weakness—in the suggestion is whether it will appeal to Congress as a practical way to meet a difficult problem. It takes more than a good idea to gain acceptance; and especially so when the very people, in large part, innocently or erroneously, responsible for the evil must be asked to provide a remedy against their own wrongs. Powerful advocates must be found both within and without Congress before the suggestion is brought within the realm of possibility.